

157 FERC ¶ 61,094
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, and Colette D. Honorable.

Nevada Power Company
Sierra Pacific Power Company
South Point Energy Center, LLC

Docket No. EC16-130-000

ORDER CONDITIONALLY AUTHORIZING ACQUISITION
AND DISPOSITION OF JURISDICTIONAL FACILITIES

(Issued November 9, 2016)

1. On June 7, 2016, Nevada Power Company (Nevada Power), Sierra Pacific Power Company (Sierra Pacific), and South Point Energy Center, LLC (South Point) (collectively, Applicants) filed an application (Application) under section 203(a)(1) of the Federal Power Act (FPA).¹ Applicants request authorization for a transaction in which Nevada Power and Sierra Pacific (together, NV Energy) would acquire a 550 megawatt (MW) natural gas-fired combined cycle electric generation plant from South Point (Proposed Transaction).
2. We have reviewed the Proposed Transaction under the Commission's Merger Policy Statement.² As discussed below, we will conditionally authorize the Proposed Transaction as consistent with the public interest.

¹ 16 U.S.C. § 824b(a)(1) (2012).

² See *Inquiry Concerning the Commission's Merger Policy Under the Federal Power Act: Policy Statement*, Order No. 592, FERC Stats. & Regs. ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 79 FERC ¶ 61,321 (1997) (Merger Policy Statement). See also *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,252 (2007), *order on clarification and reconsideration*, 122 FERC ¶ 61,157 (2008). See also *Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, FERC Stats. & Regs. ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 94 FERC ¶ 61,289 (2001). See also *Transactions Subject to FPA Section 203*, Order No. 669, FERC Stats. & Regs. ¶ 31,200 (2005), *order on reh'g*, Order No. 669-A, FERC Stats. & Regs. ¶ 31,214, *order on reh'g*, Order No. 669-B, FERC Stats. & Regs. ¶ 31,225 (2006).

I. Background

A. Description of the Applicants

Nevada Power and Sierra Pacific

3. Applicants state that Nevada Power and Sierra Pacific are wholly owned subsidiaries of NV Energy, Inc. NV Energy, Inc., in turn, is an indirect, wholly owned, subsidiary of Berkshire Hathaway Energy Company.³

4. Applicants state that Nevada Power serves retail and wholesale customers in southern Nevada, and is regulated by the Public Utilities Commission of Nevada (Nevada Commission) and the Commission. Nevada Power serves about 859,000 retail residential, commercial and industrial customers. Nevada Power owns approximately 1,725 miles of high voltage transmission lines. Nevada Power additionally makes wholesale sales under agreements on file with the Commission or under terms of its Commission-granted market-based rate authority, but it does not have market-based rate authorization in the NV Energy balancing authority area. Nevada Power provides open access transmission service under the terms of the Nevada Power Company and Sierra Pacific Power Company Open Access Transmission Tariff (NV Energy OATT).⁴ Nevada Power and Sierra Pacific jointly dispatch their generation resources according to the terms of a Joint Dispatch Agreement on file with the Commission.⁵

5. Applicants state that Sierra Pacific serves retail and wholesale customers in northern Nevada, and is regulated by the Nevada Commission and the Commission. Sierra Pacific serves about 367,000 retail residential, commercial and industrial customers. Sierra Pacific operates approximately 2,150 miles of high voltage transmission lines. Sierra Pacific makes wholesale sales under agreements on file with the Commission or under terms of its Commission-granted market-based rate authority, but it does not have market-based rate authorization in the NV Energy balancing authority area.⁶ Sierra Pacific provides open access transmission service under the terms of the NV Energy OATT.

³ Application at 5.

⁴ *Id.* at 6.

⁵ *Id.* at 5-6.

⁶ *Id.* at 6.

B. South Point

6. Applicants state that South Point is an indirect, wholly owned subsidiary of Calpine Corporation (Calpine). South Point owns and operates the South Point Facility, a 550 MW natural gas-fired, combined-cycle electric generating facility located on the Fort Mojave Reservation near Bullhead City, Arizona. The South Point Facility is interconnected with the transmission system of the Western Area Power Administration. South Point is an exempt wholesale generator under the Public Utility Holding Company Act of 2005.⁷ South Point is authorized by the Commission to sell energy, capacity, and certain ancillary services at market-based rates.⁸

C. Proposed Transaction

7. Applicants state that pursuant to an Asset Purchase Agreement, Nevada Power will acquire all of South Point's ownership interests in the South Point Facility, as well as the associated interconnection facilities and other assets, rights, interests, books and records associated with the facility. Following the closing of the Proposed Transaction, Applicants state that Nevada Power and Sierra Pacific will likely enter into an inter-company agreement to allocate a portion of the capacity to Sierra Pacific, which would be utilized as a form of joint ownership. Applicants state that the exact form of the arrangement is not yet known, and will be subject to approval by the Nevada Commission. NV Energy will inform the Commission of the details of any such agreement at the appropriate time.⁹ Applicants state that the terms of that arrangement should have no impact on the section 203 analysis here, as control of the South Point Facility will be attributed jointly to Nevada Power and Sierra Pacific, and ask the Commission to approve the Proposed Transaction without regard to the ultimate terms of such inter-company arrangement.

8. Applicants note that Nevada Power has already committed to retirements of several facilities, including the retirement of Reid Gardner 4 (257 MW), disposal of Nevada Power's ownership interest in the Navajo Generating Station (255 MW), and the termination of a summer-only tolling agreement with the Griffith Energy Center (570 MW). Applicants argue that the proposed acquisition of the 550 MW South Point Facility would replace slightly more than half of the 1082 MW of summer peaking that will be retired.¹⁰ Applicants state that

⁷ 42 U.S.C. §§ 16452 *et seq.* (2012).

⁸ Application at 7.

⁹ *Id.* at 12, n.29.

¹⁰ *Id.* at 10.

NV Energy is forecasting significant capacity shortfalls for the summer of 2018, and that the Proposed Transaction is a part of its efforts to close that gap.

II. Notice of Filing and Responsive Pleadings

9. Notice of the Application was published in the *Federal Register*, 81 Fed. Reg. 38,695 (2016), with interventions and protests due on or before June 28, 2016. On June 16, 2016, the Commission issued an errata notice extending the comment period to August 8, 2016. A notice of intervention was filed by the Nevada Commission. Fort Mojave Indian Tribe filed a timely motion to intervene and comments. Fort Mojave Indian Tribe states that it strongly supports the Proposed Transaction as many members of the tribe work at the South Point Facility and its continued operation would provide economic benefits to the tribe and others.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2016), the notice of intervention filed by the Nevada Commission and timely motion to intervene filed by Fort Mojave Indian Tribe serve to make them parties to this proceeding.

B. Authorization of Proposed Transaction Under Section 203

1. Standard of Review Under Section 203

11. Section 203(a)(4) of the FPA requires the Commission to approve a transaction if it finds that the transaction "will be consistent with the public interest."¹¹ The Commission's analysis of whether a transaction is consistent with the public interest generally involves the consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.¹² Section 203(a)(4) also requires the Commission to find that the transaction "will not result in cross-subsidization of a non-utility associate company or the pledge or encumbrance of utility assets for the benefit of an associate company, unless the Commission determines that the cross-subsidization, pledge or encumbrance will be consistent with the public interest."¹³ The Commission's regulations establish verification and

¹¹ 16 U.S.C. § 824b(a)(4) (2012).

¹² See Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,111.

¹³ 16 U.S.C. § 824b(a)(4) (2012).

informational requirements for applicants that seek a determination that a transaction will not result in inappropriate cross-subsidization or pledge or encumbrance of utility assets.¹⁴

2. Effect on Horizontal Competition

a. Applicants' Analysis

12. Applicants argue that the Proposed Transaction will not have an adverse impact on horizontal competition. Applicants explain that NV Energy performed a delivered price test that shows the Proposed Transaction presents certain screen failures but maintain that no adverse effects will occur as a result of the Proposed Transaction.¹⁵ Applicants state that the Available Economic Capacity measure is the more relevant measure for evaluating the effect on competition of the Proposed Transaction.¹⁶ Applicants calculated the Herfindahl-Hirschman Index (HHI)¹⁷ change ranging from a decrease of 43 points in an unconcentrated market to an increase of 951 points in a highly concentrated market. Applicants' base case analysis shows screen failures in the summer season/load level during both the peak and off-peak conditions and during the winter season/load level under all conditions. Applicants' analysis shows the same screen failures when prices rise 10 percent.¹⁸ Applicants state that the

¹⁴ 18 C.F.R. § 33.2(j) (2016).

¹⁵ Application at 14-15.

¹⁶ *Id.* at 16.

¹⁷ The HHI is a widely accepted measure of market concentration, calculated by squaring the market share of each firm competing in the market and summing the results. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases. Markets in which the HHI is less than 1,000 points are considered to be unconcentrated; markets in which the HHI is greater than or equal to 1,000 but less than 1,800 points are considered to be moderately concentrated; and markets in which the HHI is greater than or equal to 1,800 points are considered to be highly concentrated. In a horizontal merger, an increase of more than 50 HHI points in a highly concentrated market or an increase of 100 HHI points in a moderately concentrated market fails the relevant screen and warrants further review. Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,129; *see also Analysis of Horizontal Market Power under the Federal Power Act, (Order Reaffirming Commission Policy and Terminating Proceeding)*, 138 FERC ¶ 61,109 (2012) (affirming the Commission's use of the thresholds adopted in the Merger Policy Statement).

¹⁸ Under Applicants' +10 percent case, the Proposed Transaction fails the Commission's screens in the summer during both the super-peak 2, peak and off-peak conditions and during the winter under all conditions.

screen failures for the summer season/load period are temporary and only applicable for the summer season of 2017 before the expiration of a 570 MW summer-only tolling agreement with the Griffith Energy Center. Applicants' analysis shows screen failures under the Economic Capacity measure for all seasons/load periods in the NV Energy balancing authority area with HHI changes ranging from 372 to 728 in a highly concentrated market.¹⁹

13. Applicants note several facts about the NV Energy balancing authority area that they explain disprove any notion that the Proposed Transaction will have an anti-competitive effect. Applicants explain that there is an extremely small amount of non-NV Energy load in the NV Energy balancing authority area and that these loads have already secured supplies for all or a portion of their peak load.²⁰ Applicants calculate that there would be 6.8 to 13 times enough competing supply to cover such load even after the Proposed Transaction. Applicants argue that the delivered price test results show only that NV Energy has a large market share of excess generation for which there is no remaining demand.²¹

14. Applicants offer a number of other reasons to explain why the screen failures are not indicative of a market power issue. Those include: (1) the winter screen failures are not indicative of market power because load drops precipitously from summer to winter leaving excess supply with little demand;²² (2) NV Energy does not make sales at market-based rates in the NV Energy balancing authority area and therefore has limited ability to raise prices;²³ (3) there are few third-party trades in the NV Energy balancing authority, suggesting that the NV Energy balancing authority area is not "conducive to the exercise of market power by NV Energy;"²⁴ (4) NV Energy credits 100 percent of off-system sales back to native load customers, which removes any incentive to exercise market power;²⁵ (5) NV Energy is a net buyer of energy;²⁶ (6) the Proposed Transaction does not eliminate a competitor as South Point does not make sales within the NV Energy balancing authority area and is a financially

¹⁹ Application at Exh NCI-11.

²⁰ *Id.* at 18.

²¹ *Id.* at 19.

²² *Id.* at 20-25.

²³ *Id.* at 26-27.

²⁴ *Id.* at 27-28.

²⁵ *Id.* at 28-29.

²⁶ *Id.* at 29-30.

distressed facility that is likely to exit its market if the Proposed Transaction does not close;²⁷ and (7) the South Point Facility will be operated as a baseload facility, which does not lend itself to a withholding strategy.²⁸

15. Applicants nonetheless offer a mitigation proposal to offset the possibility of any adverse competitive impact of the Proposed Transaction and to eliminate or significantly reduce the indicated screen failures. NV Energy will offer to the market up to 504 MW of available “system” economic capacity (Mitigation Energy) for each period (as noted below) for which the delivered price test shows screen failures (Mitigation Periods). During the Mitigation Periods, NV Energy commits to make up to 504 MW of Mitigation Energy available on a day-ahead basis. Applicants explain that this is not unit contingent South Point Facility capacity, but the amount of system energy equivalent to the addition of the South Point Facility to the NV Energy fleet. Mitigation Energy will be a firm product under WSPP Schedule C for bilateral sales and will be subject to the terms of the California Independent System Operator Corporation (CAISO) tariff for sales into the CAISO Day-Ahead Market and CAISO Energy Imbalance Market (EIM). NV Energy will offer Mitigation Energy under its FERC-approved cost-based rate tariff or, for offers into the CAISO EIM, at the cost-based Default Energy Bid calculated in accordance with the CAISO’s requirements. Applicants state that the mitigation proposal will apply to the following seasons, which are associated with the delivered price test screen failures: June through September 2017; November 2017 through January 2018; November 2018 through January 2019; and December 2019.²⁹

16. Applicants state that NV Energy will offer the Mitigation Energy in three successive postings. NV Energy will first post available Mitigation Energy to an electronic trading platform on a day-ahead basis. As a potential sale under the cost-based tariff, this energy will be made available for sale inside or outside the NV Energy balancing authority area. Mitigation Energy during this phase will be priced at or below the caps in the NV Energy cost-based tariffs on file with the Commission. Second, Mitigation Energy that is not sold in the Phase 1 posted offer will be offered in the CAISO Day-Ahead Market in accordance with the CAISO market timelines. While any resulting sales will be made pursuant to the NV Energy market-based rate tariffs, these offers of Mitigation Energy will also be capped at rates found in the NV Energy cost-based tariff. Finally, Mitigation Energy that is not sold in the Phase 1 posted offer or which does not clear the CAISO Day-Ahead Market as a result of the Phase 2 offer will be offered into the CAISO EIM as an EIM bid. Any EIM Bids of Mitigation Energy will be priced at the Default Energy Bid, which is the unit-specific cost-based rate set by CAISO. Applicants assert that this EIM bidding will ensure that any excess capacity remains

²⁷ *Id.* at 30-33.

²⁸ *Id.* at 33-34.

²⁹ *Id.* at 35.

available to the market for balancing when dispatch is controlled by CAISO, ensuring that the energy cannot be used for withholding.³⁰

17. Applicants explain that certain limitations on the Mitigation Energy will be put in place. Under these limitations, NV Energy will only offer system energy that is reasonably anticipated to be available and capable of performing after serving native load obligations. Further, a unit outage may also limit the amount of energy made available. NV Energy will also not offer energy that will result in unit cycling, or violations of natural gas supply or pipeline operating constraints.³¹

18. Applicants explain that the Mitigation Energy will be offered during the periods in summer when there is an overlap with the summer-only Griffith Energy Facility tolling agreement for 570 MW, and that the mitigation proposal will remain in place during the winter periods prior to both the retirement of the Reid Gardner Unit 4 facility, consisting of 257 MW of generating capacity, and the termination of NV Energy's ownership interest in the Navajo Generating Station (currently expected to occur in December 2019), consisting of approximately 255 MW of capacity.³²

b. Commission Determination

19. In analyzing whether a transaction will adversely affect competition, the Commission examines the effects on concentration in the generation markets or whether the transaction otherwise creates an incentive and ability to engage in behavior harmful to competition, such as withholding of generation (horizontal concerns). As explained below, we find that Applicants have not demonstrated that the Proposed Transaction, with the mitigation as proposed by Applicants, will not have an adverse effect on horizontal competition. Therefore we condition our approval here upon the adoption of additional mitigation measures, as discussed below.

20. The Commission's regulations require the submission of a "horizontal Competitive Analysis Screen if, as a result of the proposed transaction, a single corporate entity obtains ownership or control over the generating facilities of previously unaffiliated merging entities."³³ The Commission is normally concerned with cases where there are systemic screen failures, that is, where screen failures "present a consistent pattern across time periods and/or

³⁰ *Id.* at 35-36.

³¹ *Id.* at 38-39.

³² *Id.* at 39-40.

³³ 18 C.F.R. § 33.3(a)(1) (2016).

markets.”³⁴ The Commission has indicated that systematic screen failures in markets that are highly concentrated and where an entity seeking authorization has a significant share of the market are a cause for concern.³⁵ In this proceeding, the screen failures in the NV Energy balancing authority area demonstrate a consistent pattern across various time periods and therefore indicate potential harm to competition. The failures are present in both summer and winter seasons under various load conditions, as well as under ten percent higher prices. We also note that the Economic Capacity screen failures across all ten season/load periods provide additional concern.

21. The Commission has stated that, under certain circumstances, applicants can address market conditions beyond the change in HHI, such as demand and supply elasticity, ease of entry and market rules, as well as technical conditions, such as the types of generation involved.³⁶ In addition, in the Supplemental Policy Statement, the Commission stated that, under certain circumstances, the Commission’s analysis of horizontal mergers focuses on the effect on the merged firm’s *ability* and *incentive* to withhold output in order to drive up the market price.³⁷ Applicants have attempted to explain why other factors support a finding of no adverse effect on competition here but have not convinced us.³⁸ While the arguments Applicants make, taken together, could support a finding that a small screen failure in one or two periods is not indicative of market power, the screen failures in the instant case are both severe and occur under multiple conditions. Applicants downplay the significance of the larger screen failures during the winter periods, but, in addition to the above, they occur at a time when other competitors may perform maintenance or otherwise take their capacity offline, which could further allow NV Energy to exercise market power.

22. Applicants note that they do not have market-based rates in the NV Energy balancing authority area. While the lack of market-based rates is a mitigating factor, it does not

³⁴ *CP&L Holdings, Inc.*, 92 FERC ¶ 61,023, at 61,054 (2000).

³⁵ *Nevada Power Co.*, 113 FERC ¶ 61,265, at P 15 (2005) (explaining that systematic screen failures would be cause for concern if a market was highly concentrated and post-merger the applicant had a more significant market share).

³⁶ See Order No. 642, FERC Stats. & Regs. ¶ 31,111 at 31,897; *Duke Energy Corp.*, 136 FERC ¶ 61,245, at P 126 (2011).

³⁷ *Supplemental Policy Statement*, FERC Stats. & Regs. ¶ 31,253 at P 60.

³⁸ Applicants have drawn comparisons to the Commission determination in *Osprey Energy Center, LLC*, 152 FERC ¶ 61,066 (2015) (*Osprey*), where the Commission found no adverse effect on competition despite screen failures in multiple seasons. In this case we consider the facts on their own merits and reach a different conclusion.

overcome the competitive concerns raised by the increase in market concentration as a result of the Proposed Transaction. Applicants argue that it would be impossible to charge monopoly rents in the NV Energy balancing authority area, but this does not justify allowing a transaction that would otherwise worsen competition. The Commission's review of transactions under section 203 of the FPA is separate and distinct from our review of market-based rates under section 205, and operates under a different standard of review.³⁹

23. While NV Energy is required to credit 100 percent of off-system wholesale sales to retail customers, that does not necessarily mean that it has no incentive to increase rates. For instance, the credit may allow for the cross-subsidization by exercising market power with one set of customers in order to favor another set of customers. At any rate, this type of crediting mechanism does not alleviate the Commission's concern regarding screen failures as significant as this case.

24. While Applicants represent that NV Energy is a net buyer of energy, this contradicts the delivered price test. We would expect that a net buyer of energy would have very little Available Economic Capacity for those periods in which it was either short on available capacity or its generation was uneconomic. However, the delivered price test results in this case show NV Energy as having nontrivial Available Economic Capacity in nine of ten season/load periods. Thus, if NV Energy is a net buyer over the course of the year even though it has capacity that is economic and not dedicated to serving its own load, the Commission is concerned about the effect on competition from NV Energy making sales to other entities when it is unwilling or unable to use its own generation. In other words, Applicants' modeling assumptions tell a different story than the explanation of the market conditions. Further, while Applicants explain that the Proposed Transaction does not eliminate a competitor because South Point has not made sales into the NV Energy market, the delivered price test considers competitors that are able to respond to a price increase of a potential seller. Therefore, were prices to rise in the NV Energy balancing authority area, buyers seeking an alternative supplier that is able to deliver energy into the market would no longer have the option of purchasing from the South Point Facility as an independent competitor.

25. Finally, Applicants' argument that the South Point Facility is ill-suited for withholding because it will be dispatched as baseload capacity ignores the entirety of the NV Energy portfolio. While the South Point Facility itself may not be used to exercise market power, the acquisition of the facility can shift out NV Energy's supply curve and allow for greater incentive to withhold output of its other, non-baseload facilities.

26. For all of these reasons, Applicants have not convinced us to look past the systemic screen failures in the delivered price test. We cannot, therefore, find that the Proposed Transaction has no adverse effect on competition. Moreover, we are not persuaded that

³⁹ See *First Energy Serv. Co.*, 143 FERC ¶ 61,062, at P 26 (2013).

Applicants' mitigation proposal adequately addresses the concern that the Proposed Transaction has an adverse effect on horizontal competition. The Commission has accepted various forms of mitigation when authorizing transactions under section 203 where the transactions pose competitive concerns. The mitigation proposals have been structural (e.g., divestitures, transmission expansion),⁴⁰ behavioral (e.g., offer restrictions, independent market monitoring),⁴¹ and virtual (e.g., temporary relinquishing control of capacity via a power purchase or similar agreement)⁴² The Commission has generally considered structural remedies when a market power concern arises that is persistent over time and behavioral remedies or virtual divestitures when the market power concern is temporary, either due to short overlap before a facility retires or in the period after closing but prior to divestiture. Here Applicants' mitigation proposal consists of a behavioral remedy in place until certain facilities are no longer controlled by NV Energy. However, it appears that the mitigation proposal allows NV Energy to not offer the energy at issue under various circumstances. This revocability means the potential supply that could alleviate the Commission's competitive concerns may be withdrawn during periods when it could be most needed. Also, the offer of system energy rather than unit-specific energy could mean that any offer of Mitigated Energy is priced higher than the South Point Facility unit price and, therefore, could be uneconomic, with the same result as if Economic Capacity were withheld.

27. Additionally, we were unable to verify the results of the Simultaneous Transmission Import Limit (SIL) values used in Applicants' delivered price test. Thus, if Applicants choose to submit a revised mitigation proposal, we will require that it cover the shoulder periods until such time as Reid Gardner Unit 4 is retired and NV Energy is no longer affiliated with the Navajo Generating Station. Since NV Energy uses the generation shift scaling methodology,

⁴⁰ See *Oklahoma Gas and Electric Co.*, 124 FERC ¶ 61,239, at PP 50-54 (2008) (finding a transmission expansion proposal acceptable as mitigation); *Exelon Corp.* 138 FERC ¶ 61,167, at P 93 (2012) (accepting a divestiture proposal to address an adverse effect on horizontal competition).

⁴¹ *Exelon Corp.* 138 FERC ¶ 61,167, at P 94 (2012) (accepting a bidding restrictions proposal to address an adverse effect on horizontal competition).

⁴² *Tucson Electric Power Co.* 156 FERC ¶ 61,170, at P 19 (2016) (accepting a firm sale as a mitigation measure to alleviate a temporary market power concern).

the load between the benchmark and scaled cases for each specific season (i.e. summer, fall, winter, spring) should have remained unchanged.⁴³ However, Applicants' SIL study reflects differences in loads as high as 1,748 MW. The differences in loads are not related to load shift methodology nor do they have a specific pattern that indicates a logical explanation for the change. This high variance in loads between the benchmark and scaled case alters the SIL values considerably. For example, if the load between benchmark and scaled case for the spring season would have remained at 5,177 MW and not changed to 6,532 MW, the final SIL value for the case would have been 3,659 MW instead of 4,217 MW as reported and used in the delivered price test. If the SIL value used in the delivered price test were reduced by 558 MW, it is likely that NV Energy's failures would be exacerbated.

28. Therefore, a determination by the Commission that the Proposed Transaction has no adverse effect on competition is contingent upon Applicants submitting a compliance filing with an acceptable mitigation proposal. That compliance filing may revise the mitigation proposal such that the Mitigation Energy offered is unit-specific and non-revocable, and extends to the shoulder seasons. Alternatively, Applicants may submit alternative mitigation to be evaluated by the Commission.⁴⁴

3. Effect on Vertical Competition

a. Applicants' Analysis

29. Applicants state that the Proposed Transaction will have no adverse effect on vertical market power. Applicants state that the Proposed Transaction is narrowly focused on the South Point Facility and its associated interconnection facilities and does not include any other transmission assets or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, no change in control over electric

⁴³ See *Carolina Power & Light Co.*, 129 FERC ¶ 61,152, at P 18 (2009) ("The load-shift scaling method is an energy transfer modeling technique used during the energy transfer calculation portion of the SIL study that scales-up load in the study area while simultaneously scaling-down load in the first-tier area; existing generation in the first-tier area is thus available to serve additional load in the study area. Conversely, the generation-shift scaling method increases available uncommitted generation in the first-tier area while simultaneously decreasing generation in the study area.").

⁴⁴ This finding is consistent with the Merger Policy Statement, where the Commission noted that the merger guidelines "contemplate using remedies to mitigate any harm to competition." The Commission explained that "[t]here could be mergers where, at the end of an analysis, market power concerns persist but that could be made acceptable with measures to mitigate potential market power problems." 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,118.

transmission assets will occur as a result of the Proposed Transaction. Further, NV Energy operates its transmission systems pursuant to the NV Energy OATT on file with the Commission. Applicants additionally state that the Proposed Transaction does not involve any inputs to electricity production that would allow NV Energy to erect barriers to entry.⁴⁵

b. Commission Determination

30. In analyzing whether a proposed transaction presents vertical market power concerns, the Commission considers the vertical combination of upstream inputs, such as transmission or natural gas, with downstream generating capacity. As the Commission has previously found, transactions that combine electric generation assets with inputs to generating power (such as natural gas, transmission, or fuel) can harm competition if the transaction increases an entity's ability or incentive to exercise vertical market power in wholesale electricity markets. For example, by denying rival entities access to inputs or by raising their input costs, an entity created by a transaction could impede entry of new competitors or inhibit existing competitors' ability to undercut an attempted price increase in the downstream wholesale electricity market.⁴⁶

31. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on vertical competition. The Proposed Transaction does not involve any transmission assets (other than limited interconnection facilities) or other inputs to electricity generation such as fuel supply or transportation facilities or new sites for generation. Thus, no change in control over electric transmission assets will occur as a result of the Proposed Transaction, and the Proposed Transaction will not increase NV Energy's ability to erect barriers to entry.

4. Effect on Rates

a. Applicants' Analysis

32. Applicants state that the Proposed Transaction will have no adverse impact on wholesale requirements customers or transmission customers.⁴⁷ Applicants state that South Point makes sales exclusively pursuant to its market-based rate tariff and does not have any captive customers. Applicants state that Nevada Power does not have any wholesale requirements customers. Applicants note that Sierra Pacific's one wholesale requirements

⁴⁵ Application at 44.

⁴⁶ *Upstate Power Producers*, 154 FERC ¶ 61,015, at P 15 (2016); *Exelon Corp.*, 138 FERC ¶ 61,167, at P 112 (2012).

⁴⁷ Application at 45.

customer, Liberty Electric, is provided service under a long-term power purchase agreement with a fixed demand charge that cannot be changed without a filing with the Commission. Applicants conclude that there is no way for the purchase price of the South Point Facility to automatically flow through to Liberty Electric.⁴⁸ Applicants state that NV Energy sells power at market-based rates outside of the NV Energy balancing authority area. Applicants note that NV Energy also maintains cost-based and coordination tariffs that contain fixed demand charges and other fixed components, as well as a variable component based on system incremental costs, which cannot be changed without an FPA section 205 filing.⁴⁹ Applicants state that the Proposed Transaction will have no adverse impact on the rates, terms or conditions of jurisdictional transmission services. Applicants explain that neither the NV Energy OATT nor any other of the NV Energy transmission service agreements affected by the Proposed Transaction include formula rates, so the Proposed Transaction will not affect wholesale transmission rates.⁵⁰

b. Commission Determination

33. Based on Applicants' representations, we find that the Proposed Transaction will not have an adverse effect on rates. As Applicants note, Nevada Power has no wholesale requirements customers and Sierra Pacific lacks any mechanism to pass through the costs of the Proposed Transaction to its sole wholesale requirements customer. With respect to transmission rates, neither the NV Energy OATT nor any other NV Energy transmission service agreement includes formula rates, so the Proposed Transaction will not have any automatic effect on wholesale transmission rates. We note that no party has argued that the Proposed Transaction will have an adverse impact on rates.

5. Effect on Regulation

a. Applicants' Analysis

34. According to Applicants, the Proposed Transaction will not have an adverse impact on regulation, at either the federal or state level. Applicants state that all wholesale sales and unbundled transmission services provided by NV Energy will remain subject to the Commission's jurisdiction under the FPA. Moreover, all retail sales, bundled transmission and distribution services provided by NV Energy will continue to be subject to regulation by the Nevada Commission and approval of the Proposed Transaction is also contingent on obtaining

⁴⁸ *Id.* at 46.

⁴⁹ *Id.*

⁵⁰ *Id.* at 47.

the necessary Nevada Commission. Thus, Applicants submit that the Proposed Transaction will have no adverse effect on regulation.⁵¹

b. Commission Determination

35. The Commission's review of a transaction's effect on regulation focuses on ensuring that it does not result in a regulatory gap.⁵² As to whether a proposed transaction will have an effect on state regulation, the Commission explained in the Merger Policy Statement that it ordinarily will not set the issue of the effect of a proposed transaction on state regulatory authority for a trial-type hearing where a state has authority to act on the proposed transaction. However, if the state lacks this authority and raises concerns about the effect on regulation, the Commission may set the issue for hearing and it will address such circumstances on a case-by-case basis.⁵³ Based on Applicants' representations, we find no evidence that either state or federal regulation will be impaired by the Proposed Transaction. We find that the Proposed Transaction will not create a regulatory gap at the federal level because the Commission will retain its regulatory authority over NV Energy after the Proposed Transaction is consummated and NV Energy is and will continue to be subject to regulation by the Nevada Commission as to bundled transmission and distribution. Finally, we note that no party alleges that regulation, state or federal, would be impaired by the Proposed Transaction, and no state commission has requested that the Commission address the issue of the effect on state regulation.

6. Cross-Subsidization

a. Applicants' Analysis

36. Applicants explain that one new affiliate agreement will likely result from the Proposed Transaction. The agreement is an inter-company agreement between Nevada Power and Sierra Pacific which will provide for a contribution by Sierra Pacific to the fixed costs of the South Point Facility. Applicants explain that the proposed inter-company agreement is simply being utilized as a form of joint ownership agreement between Nevada Power and Sierra Pacific which will give Sierra Pacific's customers the benefits of the lower cost energy and capacity available from the South Point Facility. Applicants further state that the Commission's concern that public utilities with captive customers do not cross-subsidize non-regulated associate companies is not presented in this case, since both Nevada Power and Sierra Pacific are regulated public utilities with captive customers that already engage in joint dispatch.

⁵¹ *Id.*

⁵² 1996 Merger Policy Statement, FERC Stats. & Regs. ¶ 31,044 at 30,124.

⁵³ *Id.*

37. Applicants state that the Proposed Transaction falls within the scope of a “safe harbor,” and thus does not present any issue with respect to cross-subsidization, in that the Proposed Transaction is a bona fide, arm’s-length, bargained-for exchange between non-affiliated entities.⁵⁴ Applicants nevertheless verify that the Proposed Transaction will not now or in the future result in: (1) transfers of facilities between a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, and an associate company; (2) new issuances of securities by traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, for the benefit of an associate company; (3) new pledges or encumbrances of assets of a traditional public utility associate company that has captive customers or that owns or provides transmission service over jurisdictional transmission facilities, for the benefit of an associate company; or (4) new affiliate contracts between non-utility associate companies and traditional public utility associate companies that have captive customers or that own or provide transmission service over jurisdictional transmission facilities, other than non-power goods and services agreements subject to review pursuant to FPA sections 205 and 206.⁵⁵

b. Commission Determination

38. Based on Applicants’ representations, we find that the Proposed Transaction will not result in the cross-subsidization of a non-utility associate company by a utility company, or in a pledge or encumbrance of utility assets for the benefit of an associate company. We note that no party has argued otherwise.

7. Other

39. Information and/or systems connected to the bulk power system involved in the Proposed Transaction may be subject to reliability and cyber security standards approved by the Commission pursuant to FPA section 215. Compliance with these standards is mandatory and enforceable regardless of the physical location of the affiliates or investors, information databases, and operating systems. If affiliates, personnel or investors are not authorized for access to such information and/or systems connected to the bulk power system, a public utility is obligated to take the appropriate measures to deny access to this information and/or the equipment/software connected to the bulk power system. The mechanisms that deny access to information, procedures, software, equipment, and the like, must comply with all applicable reliability and cyber security standards. The Commission, North American Electric Reliability

⁵⁴ Application at 48 (citing Supplemental Policy Statement, 120 FERC ¶ 61,060 at P 15).

⁵⁵ *Id.* at 49, Exhibit M.

Corporation, or the relevant regional entity may audit compliance with reliability and cyber security standards.

40. Section 301(c) of the FPA gives the Commission authority to examine the books and records of any person who controls, directly or indirectly, a jurisdictional public utility insofar as the books and records relate to transactions with or the business of such public utility. The approval of the Proposed Transaction is based on such examination ability. In addition, applicants subject to Public Utility Holding Company Act of 2005 (PUHCA 2005),⁵⁶ are subject to the record-keeping and books and records requirements of PUHCA 2005.

41. Order No. 652 requires that sellers with market-based rate authority timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁵⁷ To the extent that a transaction authorized under FPA section 203 results in a change in status, sellers that have market-based rates are advised that they must comply with the requirements of Order No. 652.

42. Attachment 6 of the Application includes proposed accounting entries, without disclosing amounts, recording NV Energy's acquisition of the South Point Facility. Applicants propose to clear the acquisition through Account 102, Electric Plant Purchased or Sold, and record the original cost of the generating facility and related accumulated depreciation on their books. Applicants also propose to record an acquisition adjustment in Account 114, Electric Plant Acquisition Adjustments, and materials and supplies in Account 154, Plant Materials and Operating Supplies.

43. NV Energy proposes to amortize the acquisition adjustment by debiting Account 406, Amortization of Electric Plant Acquisition Adjustments, and crediting Account 115, Accumulated Provision for Amortization of Electric Plant Acquisition Adjustments. NV Energy states that the amortization of the acquisition adjustment to Account 406 assumes that the Nevada Commission will approve acquisition cost recovery and that any amount not allowed for recovery by the Nevada Commission will be recorded to Account 425, Miscellaneous Amortization.

44. Under the Commission's Uniform System of Accounts, acquisition adjustments must be amortized to Account 425, unless the utility has obtained rate recovery of the acquisition adjustment or reasonably expects recovery to be allowed by regulatory authorities having rate jurisdiction. NV Energy's proposed accounting for the acquired assets is found to be in

⁵⁶ 42 U.S.C. § 16452 (2012).

⁵⁷ *Reporting Requirement for Changes in Status for Public Utilities with Market-Based Rate Authority*, Order No. 652, FERC Stats. & Regs. ¶ 31,175, *order on reh'g*, 111 FERC ¶ 61,413 (2005). See 18 C.F.R. § 35.42 (2016).

compliance with Electric Plant Instruction No. 5, Electric Plant Purchased or Sold, and the instructions for Account 102. Any amounts not approved for recovery in rates should be amortized to Account 425 over a period not longer than the estimated remaining life of the property to which such amounts relate.

The Commission orders:

(A) The Proposed Transaction is hereby conditionally authorized, as discussed in the body of this order.

(B) Applicants must inform the Commission within 30 days of any material change in circumstances that departs from the facts or representations that the Commission relied upon in authorizing the Proposed Transaction within 30 days from the date of the material change in circumstances.

(C) The foregoing authorization is without prejudice to the authority of the Commission or any other body with respect to rates, service, accounts, valuation, estimates or determinations of costs, or other matter whatsoever now pending or which may come before the Commission.

(D) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(E) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(F) Applicants shall make any appropriate filings under section 205 of the FPA, as necessary, to implement the Proposed Transaction.

(G) If Applicants elect to proceed with the Proposed Transaction as authorized in this order, Applicants must submit a revised mitigation proposal within 30 days of the issuance of this order addressing the shortcomings identified in the body of the order.

(H) Applicants shall notify the Commission within 10 days of the date on which the Proposed Transaction is consummated.

(I) NV Energy shall account for the Proposed Transaction in accordance with Electric Plant Instruction No. 5 and Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts. NV Energy shall submit final accounting entries within six months of the date that the Proposed Transaction is consummated, and the accounting

submission shall provide all the accounting entries and amounts related to the Proposed Transaction along with narrative explanations describing the basis for the entries.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.